Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

MICHAEL SMITH, AMANDA KATHRYN SMITH AND MELISSA ANN SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Michael Smith, a Burlington Northern employee, alleges he received a flu shot from an employee of Advanced Occupational Health Care on the 26th floor of the Burlington Northern Building in Fort Worth, Texas. He further alleges that, after receiving the flu shot, he was permitted to leave immediately without medical supervision. He further contends he went to the 15th floor where he lost consciousness and fell, as a result of which he claims to have suffered a severe head injury.

The flu shots were made available as a convenience to Burlington Northern employees on its premises. The employees were not required to take the shots and the program was voluntary. Respondent's employment did not involve any particular risk of exposure which would cause a flu shot to be necessary.

1) Is it within the scope of employment under the Federal Employers' Liability Act ("FELA") to receive a voluntary flu shot when the shots are simply offered as a convenience to employees and there is no particular work-related risk of exposure to the virus?

2) Did the United States Court of Appeals for the Fifth Circuit incorrectly state the test for scope of employment in interstate commerce under the FELA as follows, "[A]n activity falls within the scope of employment if (1) the employer might reasonably have foreseen it and (2) the employee might reasonably have thought it necessary for the employer's benefit"?

QUESTIONS PRESENTED – Continued

3) Did the Respondents raise a genuine issue of material fact in response to Burlington Northern's Motion for Summary Judgment on the issue of whether receiving a voluntary flu shot was within Smith's scope of employment under the FELA?

LIST OF ALL PARTIES TO THE PROCEEDING

1. Plaintiffs/Appellants/Respondents

   Michael Smith
   Amanda Kathryn Smith
   Melissa Ann Smith
   540 Oak Hill Drive
   South Lake, Texas

2. Defendant (Not a party on appeal)

   Medical and Surgical Clinic Association d/b/a
   Advanced Occupational Health Care

3. Defendant (Not a party on appeal)

   Thomas V. Mears, M.D.

4. Defendant/Appellee/Petitioner

   Burlington Northern Railroad Company
   (now known as The Burlington Northern
   and Santa Fe Railway Company)
   3800 Continental Plaza
   777 Main Street
   Fort Worth, Texas

5. Supreme Court Rule 29.6 disclosures:

   Effective December 31, 1996, Burlington Northern Railroad Company merged with The Atchison, Topeka and Santa Fe Railway Company. Burlington Northern Railroad Company was the surviving company after the merger. Burlington Northern Railroad Company then changed its name to The Burlington Northern and Santa Fe Railway Company.

LIST OF ALL PARTIES TO THE PROCEEDING – Continued

Parent company of The Burlington Northern and Santa Fe Railway Company: Santa Fe Pacific Corporation.

Nonwholly owned subsidiaries of The Burlington Northern and Santa Fe Railway Company: Alameda Belt Line, The Belt Railway Company of Chicago, Camas Prairie Railroad Company, Central California Traction Company, Houston Belt & Terminal Railway Company, Iowa Transfer Railway Company, Kansas City Terminal Railway Company, Longview Switching Company, Metrovias S.A., M T Properties, Inc., The Oakland Terminal Railway, Paducah & Illinois Railroad Company, Portland Terminal Railroad Company, St. Joseph Terminal Railroad Company, Sunset Railway Company, Terminal Railroad Association of St. Louis, Texas City Terminal Railway Company, Trenes de Buenos Aires S.A., TTX Company, The Wichita Union Terminal Railway Company.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on July 31, 1997. No motion for rehearing or motion for extension of time to file a petition for writ of certiorari was filed. This Petition for Writ of Certiorari is timely filed within ninety days of the entry of judgment. This Court has jurisdiction to review the Court of Appeals' judgment by virtue of 28 U.S.C. § 1254.

STATUTE INVOLVED IN THE CASE

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the

States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 51.

STATEMENT OF THE CASE

Smith brought his action for statutory negligence against Burlington Northern under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60.

The claim under the FELA formed the basis for federal jurisdiction in the court of first instance. 28 U.S.C. § 1337.

The Fifth Circuit correctly noted the undisputed facts in this action. Burlington Northern arranged for employees at its Fort Worth, Texas, office building to receive influenza vaccinations in the fall of 1993. Burlington Northern engaged the services of a health clinic, Medical and Surgical Clinic Association d/b/a Advanced Occupational Health Care ("AOHC"), to vaccinate its employees. It is also undisputed that the flu shots were given on company premises, during work hours, at no charge to the employees. Any employee who was unable to attend a vaccination session on company premises would be excused from work to receive a flu shot at the health clinic. *Smith v. Medical and Surgical Clinic Ass'n*, 118 F.3d 416, 418 (5th Cir. 1997) (App. A-2,3.)

Respondent was a Burlington Northern manager who took part in the inoculation program, receiving a flu shot on September 28, 1993. The shot was given on the twenty-sixth floor of the Burlington Northern building. After returning to the fifteenth floor, where his office was located, Smith apparently collapsed and struck his head. He claims that the injury caused him to become permanently disabled. (App. A-3.)

Burlington Northern distributed two fliers to its employees regarding the vaccination program. Smith conceded in his deposition that the flu shots were voluntary, but stated he felt strongly encouraged to accept a flu shot by the company's fliers. Smith also testified that about two years previously he had missed work because of a severe case of the flu, and that he felt obligated as a good

employee to submit to inoculation to avoid another absence. (App. A-3.)

Burlington Northern moved for summary judgment on the ground that Smith was not injured within the course and scope of his employment. AOHC and Thomas V. Mears, M.D., co-defendants, moved for summary judgment based upon, *inter alia*, a release signed by Smith at the time of his flu shot.

Based upon the summary judgment evidence, the district court found that Smith failed to adduce sufficient evidence to raise a genuine issue of material fact as to whether Smith was acting in the course and scope of his employment when he received a flu shot. *Smith v. Medical and Surgical Clinic Ass'n*, No. 4:95-CV-920-A (N.D. Tex. June 25, 1996) (unreported Memorandum Opinion and Order) (App. B-9,10.) The district court granted final summary judgment on behalf of all defendants. (App. B-22.) Respondents did not appeal the judgment in favor of AOHC and Mears. (App. A-3, n.1.)

The Fifth Circuit reversed the district court's judgment in favor of Burlington Northern by holding that, "a genuine issue of material fact exists as to whether an employee might reasonably have believed that the flu shots were administered, in part, for Burlington Northern's benefit." (App. A-10.) It also concluded that, "under the FELA, if an employee might reasonably have thought that accepting a flu shot was necessary for the benefit of Burlington Northern, then submitting to the inoculation was an act within the scope of employment." (App. A-11.) By using this lowered threshold for scope of

employment, the court reversed the summary judgment and remanded the FELA action. (App. A-11.)

ARGUMENT

I. The Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. What is the test for scope of employment under the Federal Employers' Liability Act?

Review by this Court is appropriate because this case involves the interpretation of an important federal statute governing railroad employers' obligations to their injured employees. *Cf. Southern Pac. Co. v. Gileo*, 351 U.S. 493, 495, 76 S.Ct. 952, 955, 100 L.Ed. 1357 (1956) (granting writ on issues regarding coverage under the FELA for the same reason). The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. S.Ct.R. 10(c). The Fifth Circuit stated a standard for FELA scope of employment which is so broad as to include any act encouraged by the employer which could have any imagined tangential benefit to the employer. The court stated the test summarily as, "an activity falls within the scope of employment if (1) the employer might reasonably have foreseen it and (2) the employee might reasonably have thought it necessary for the employer's benefit." (App. A-7.) Instead of limiting scope of employment under the FELA to actual work or activities necessarily incident to employment, the Fifth Circuit's shorthand recitation expands the scope of employment to include those activities which are purely private in

nature, as long as there could be some imagined benefit to the employer. Non-incidental activities such as going to a company picnic (which could benefit the employer by providing camaraderie among co-workers), participation in a blood drive or food drive (which could benefit the company because it will be seen in a better light by the community if its employees volunteer), or even eating dinner with their spouses (which could benefit the company because a happy employee is a productive employee), could form the basis for FELA actions under the Fifth Circuit's approach. The gamut is endless for actions which are purely private in nature which may be encouraged by the employer and for which, under the Fifth Circuit's analysis, costly litigation will be inevitable.

The Fifth Circuit decision sends a message, not just to FELA employers, but to all of corporate America that engaging in humanitarian efforts unrelated to employment will expose them to potential liability. The result will be a chilling effect on the numerous programs currently offered by employers. Corporate America will recognize, as did the Texas Lawyer Magazine in its headline when it reported the Fifth Circuit's decision, "Flu's Cheaper." Texas Lawyer Magazine, August 18, 1997.

In a recent FELA decision, this Court recognized that courts must consider the general impact on workers as well as employers of general liability rules they would thereby create. *Metro-North Commuter R.R. Co. v. Buckley*, ___ U.S. ___, 117 S.Ct. 2113, 2121, 138 L.Ed.2d 560 (1997). Here, as in *Metro-North*, "[T]he relevant question concerns not simply recovery in an individual case, but the consequences and effects of *a rule of law that would permit that recovery.*" *Id.* (Court's emphasis). If the common law

concludes that a legal rule permitting recovery would on balance cause more harm than good, then that conclusion is not inconsistent with the FELA's humanitarian purpose. *Id.*

This Court has never directly addressed the issue of scope of employment under the FELA. Only in *Erie R.R. Co.*, while addressing a related issue, has this Court arguably noted a test for scope of employment under the FELA. *Erie R.R. Co. v. Winfield*, 244 U.S. 170, 37 S.Ct. 556, 557, 61 L.Ed. 1057 (1917). In *Erie*, Mr. Winfield was struck by a train as he crossed tracks in the rail yard after his shift. The action was brought under a state workers' compensation act, but the issue was whether the action was pre-empted by the Federal Employers' Liability Act. *Id.* at 557. This Court found, *inter alia*, that Winfield was employed in interstate commerce at the time of the injury: "Like his trip through the rail yard to his engine in the morning, it was a necessary incident of his day's work" to then leave the rail yard in the same manner. *Id.* This Court's decision in *Erie* pre-dates Congress' 1939 amendment to the FELA. The original statute inquired only whether the employee was engaged in interstate commerce. *See* Apr. 22, 1908, c. 149, § 1, 35 Stat. 65, *amended by* Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (current version at 45 U.S.C. § 51). Because *Erie* pre-dates the 1939 amendment and because the issue was not directly addressed, it is important to the jurisprudence of the United States for this Court to provide guidance on the issue of scope of employment under the FELA.

A decision on scope of employment would be a necessary and natural progression from this Court's previous FELA coverage decisions. The pre-1939 test inquired,

"Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" *See, e.g., New York Central R. Co. v. White*, 243 U.S. 188, 192, 37 S.Ct. 247,248, 61 L.Ed. 667 (1917) (finding that employees engaged in new construction for their railroad employers were not engaged in interstate commerce within the meaning of the Act). In 1939, Congress added a provision that expanded coverage under the FELA to include employees whose duties "directly or closely and substantially" affect such commerce. *See Southern Pac. Co.*, 351 U.S. at 499, 76 S.Ct. at 957. The first paragraph of section 51 remained the same, but the second paragraph was added to address this Court's previous holdings that, at the moment of injury, the employee as well as the railroad had to be engaged in interstate commerce and that employees engaged in construction of new facilities were not covered. *Reed v. Pennsylvania R.R. Co.*, 351 U.S. 502, 504, 76 S.Ct. 958, 960, 100 L.Ed. 1366 (1956).

Following the 1939 amendment, the courts focused on the new language of the statute requiring that the employee's duties further or substantially affect transportation. *See Reed*, 351 U.S. at 505, 76 S.Ct. at 961. However, this Court's post-1939 decisions focus on the class of employees eligible for coverage, rather than whether non-incidental activities performed by an otherwise covered employee might be excluded. *See, e.g., Reed*, 351 U.S. at 505, 76 S.Ct. at 961 (holding that a clerical employee is covered by the FELA); *Southern Pac. Co.*, 351 U.S at 499-501, 76 S.Ct. at 957-58 (holding that the following classes of employees may maintain an action under the FELA: (1) an employee of an interstate rail carrier who is

injured while performing work on new cars to be used in interstate commerce by the carrier and its subsidiary; (2) an employee injured while employed as a wheel molder in a wheel foundry where wheels are made to be joined to axles which form the truck base for the railroad's cars, both new and those already in interstate service, and (3) an employee who was injured while laying rails in a retarder yard which the railroad was constructing for the purpose of facilitating the movement of freight trains in interstate commerce by the use of a new switching method).

The issue in our case is not whether Smith is within a class of employees eligible for coverage. Instead, Smith is not eligible because receiving a flu shot was outside his scope of employment. Under the common law, an employee may take himself outside of coverage by pursuing a private activity which has nothing to do with his work. This common law analysis has been applied to the FELA context in several Circuits. *See, e.g., Rogers v. Chicago & Northern Western Transp. Co.*, 947 F.2d 837, 839 (7th Cir. 1991); *Empey v. Grand Trunk Western R. Co.*, 869 F.2d 293, 294 (6th Cir. 1989); *Wilson v. Chicago, M., St. P., P.R.R.*, 841 F.2d 1347, 1355 (7th Cir.), *cert. dism'd*, 487 U.S. 1244 (1988); *Moore v. Chesapeake & Ohio Ry. Co.*, 649 F.2d 1004, 1010 (4th Cir. 1981); *Fowler v. Seaboard Coastline R. Co.*, 638 F.2d 17, 20 (5th Cir. Unit B February 1981); *Carney v. Pittsburgh & Lake Erie RR Co.*, 316 F.2d 277, 278-79 (3d Cir.), *cert. denied*, 375 U.S. 814 (1963); *Atchison, T. & S. F. R. Co. v. Wottle*, 193 F.2d 628, 630 (10th Cir.), *cert. dism'd*, 344 U.S. 850 (1952); *Morris v. Pennsylvania R. Co.*, 187 F.2d 837, 841 (2d Cir. 1951); *Mostyn v. Delaware, L & W. R. Co.*, 160 F.2d 15, 17-18 (2d Cir.), *cert. denied*, 332 U.S. 770 (1947).

This Court has not issued an opinion which applies the common law rule limiting the scope of employment in FELA cases. The issue is ripe for consideration because scope of employment under the FELA has been addressed by several Circuit courts. Because this Court has not ruled on the issue of scope of employment for FELA claims, both state and federal court decisions will be affected by the erroneous precedent set by the Fifth Circuit in this case.

II. The Fifth Circuit has entered a decision in conflict with its own previous decision as well as other United States Courts of Appeals on the same important matter.

A. Scope of Employment Under the FELA Requires a Showing that the Injury Occurred During Actual Work or During Activities Necessarily Incident to Employment.

The United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with a decision of its own as well as other United States Courts of Appeals on the same important matter. S.Ct.R. 10(a). In its own earlier decision, the Fifth Circuit recognized that FELA scope of employment encompasses actual work performed and acts incidental to the employment. *Fowler*, 638 F.2d at 20. Activity which is customarily engaged in by all employees working an eight hour shift, such as eating lunch on company premises, is incidental to the employment and is reasonably foreseeable. *Id.* The Fifth Circuit in *Fowler* examined the statute, its history, and cases from several jurisdictions interpreting the FELA,

and finally agreed with the Tenth Circuit test for scope of employment:

> [G]iven its most liberal interpretation, 45 U.S.C. § 51 cannot be extended to cover activities not **necessarily incident to or an integral part of employment in interstate commerce.** It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment.

Id., citing *Atchison*, 193 F.2d at 630 (emphasis added). The *Fowler* court upheld a summary judgment because the employee's ride on a motorcycle during his lunch hour was a purely private activity totally unrelated to the employment, and therefore outside the scope of employment. *Fowler*, 638 F.2d at 20.

The Seventh Circuit followed *Fowler* and recognized, "Regardless of how federal courts have stated the tests, in order for an activity to qualify as being within the scope of employment, it must be a necessary incident of the day's work or be essential to the performance of the work." *Rogers*, 947 F.2d at 839.

The district court in our case appropriately determined that this case closely parallels *Rogers* in which the plaintiff, who was injured while jogging on his employer's property, argued that his jogging was related to his employment because his employer required that employees be able to pass a physical exam and encouraged physical activity during layovers by providing passes to the YMCA. (App. B-9.) The plaintiff admitted that jogging was not a requirement and failed to present evidence that physical exercise was a necessary prerequisite to passing a physical exam. *Rogers*, 947 F.2d at 839.

Jogging for exercise, just as receiving a voluntary flu shot, benefits an employer, if at all, in such an indirect and tangential way that Smith cannot be said to have been acting in the scope of employment. *See id.* (App. B-9.)

The Circuits are generally in agreement with the standard for scope of employment except for the deviation in this case. *Wilson*, 841 F.2d at 1355 (Even if not required, an act could be within the scope of employment if it is a necessary incident of his day's work.); *Empey*, 869 F.2d at 294 (Injuries which occur due to hotel accommodations which employer has provided are within the scope of employment. An employee is required to rest by statute.); *Moore*, 649 F.2d at 1010 (A slip and fall in a company provided cafeteria was covered by the FELA. Eating lunch is a necessary incident of employment.); *Carney*, 316 F.2d at 278-79 (Housing and feeding, though not literally part of the work, are necessary to performance.); *Morris*, 187 F.2d at 841 (Course of employment is not limited to actual work done but includes passage across employer's premises to and from an employee's place of work that is a necessary incident of the day's work.); *Mostyn*, 160 F.2d at 17-18 (When a railroad provides shelter or food or both for employees, and they are using the accommodations so provided to prepare themselves for work, or to rest and recuperate, they must be regarded as in the "employ."). In summary, the proper standard for "scope of employment in interstate commerce" under the FELA is whether the employee was injured while engaged in actual work or activities necessarily incident to employment. An activity may be necessarily incident to employment if it involves acts which are

essential to life, comfort, and convenience, such as eating, drinking, or resting.

The RESTATEMENT (SECOND) OF AGENCY also provides support for the established common law approach as follows:

> § 229. Kind of Conduct within Scope of Employment
>
> (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
>
> (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
>
> (a) whether or not the act is one commonly done by such servants;
>
> (b) the time, place and purpose of the act;
>
> (c) the previous relations between the master and the servant;
>
> (d) the extent to which the business of the master is apportioned between different servants;
>
> (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
>
> (f) whether or not the master has reason to expect that such an act will be done;
>
> (g) the similarity in quality of the act done to the act authorized;

> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
>
> (i) the extent of departure from the normal method of accomplishing an authorized result; and
>
> (j) whether or not the act is seriously criminal.

RESTATEMENT (SECOND) OF AGENCY § 229 (1958). Comment b to section 229 provides that, "To be incidental, however, [the act] must be one which is subordinate to or pertinent to an act which the servant is employed to perform." *Id.* Comment c provides, "If, however, such acts are for the personal convenience of the employees and are merely permitted by the master in order to make the employment more desirable, the acts are not within the scope of employment." *Id.* Since the material facts are not disputed, but only the application of the law to the facts is disputed, this issue may be resolved by summary judgment.

Although this Court has never specifically stated the test, it appears that *Erie R.R. Co.* would support the same analysis as set forth by the majority of Circuits and the RESTATEMENT, i.e., the activity must be a necessary incident of employment. *Erie R.R. Co.*, 37 S.Ct. at 557. However, as discussed above, since *Erie R.R. Co.* was decided prior to the 1939 amendment and because the issue was not directly addressed, this Court's current statement is necessary for the development of uniform law on this issue.

As the parties acknowledged below, the Fifth Circuit's earlier *Fowler* opinion articulated principles governing the legal issue in the case. (App. A-7.) However, the Fifth Circuit in our case misreads part of *Fowler* in order to come up with its new test. Instead of relying on the conclusion in *Fowler* which follows the appropriate "necessary incident of employment" test, the Fifth Circuit instead relies on a 1962 case which *Fowler* misinterprets. *Fowler*, 638 F.2d at 20, citing *Texas and Pac. Ry. v. Jones*, 298 F.2d 188, 192 (5th Cir. 1962). The "test" which *Fowler* refers to as being enunciated in *Texas and Pac. Ry.* does not actually exist. The *Texas and Pac. Ry.* court did not establish a "test" for scope of employment because the court did not address the issue of whether the jury instruction contained a proper test for scope of employment. The railroad's complaint on appeal was with the order of the jury instructions, not their content. *Texas and Pac. Ry.*, 298 F.2d at 192.

The standard adopted by the Court of Appeals is inconsistent with the principles embodied in the statute and with relevant common law doctrine. The Fifth Circuit's opinion will cause unnecessary confusion on the issue of scope of employment in FELA cases. Now that the Fifth Circuit has opened the door, more FELA suits are sure to arise in the area of voluntary flu shots or other vaccinations, blood drives, charitable donations, health fairs, company picnics, attendance at secondary education paid for by the employer, and other purely private pursuits.

B. Receiving a Flu Shot Was Not a Necessary Incident of Smith's Employment.

Arguably, under exceptional circumstances, an inoculation can become a necessary incident to employment. Some state court cases involve such extenuating circumstances. When the plaintiff presents evidence that the inoculation is required as a condition of employment, there may be a fact question as to whether receiving the inoculation was within the scope of employment. *See, e.g., Lampkin v. Harzfeld's*, 407 S.W.2d 894, 896-97 (Mo. 1966) (Plaintiff testified that she "was advised that it would be necessary for her to take a series of flu shots," she was "instructed" to appear by the "personnel department."). Another example of extenuating circumstances arises when the plaintiff presents evidence that the need for the inoculation arises due to the particular type of work to be performed or particular exposure during the course and scope of work. *See, e.g., Monette v. Manatee Memorial Hospital*, 579 So.2d 195, 196-97 (Fla. 1991) (By virtue of her employment in a hospital setting, claimant recognized her responsibility to protect patients from exposure to flu, and availed herself, being at high risk of infection, of the opportunity to avoid contracting the flu.); *Suniland Toys and Juvenile Furniture, Inc. v. Karns*, 148 So.2d 523, 524-25 (Fla. 1963) (The employee drank typhoid contaminated water on the premises and later became ill from the typhoid shot. The court found an element of coercion to take the shot undoubtedly existed in the fact of her exposure in her employment to a risk of disease from consumption of the water. The court noted the employer was not simply promoting public health or simply providing preventative inoculation – but related instead to

the prevention of a potential disability to which the claimant had at the time in question been directly exposed to as a result of her work.)

Petitioner provides a short analysis of the above state court cases because counsel believes they represent a reasonable exception to the general rule that vaccinations are not within the scope of employment. State common law is not much different from federal common law on the scope of employment. For instance, the Fifth Circuit has interpreted the Texas Workers' Compensation scope of liability to include acts essential to life, comfort, and convenience of an employee at work, such as going to get a drink of water, because they are incidental to employment. *See New York Cas. Co. v. Wetherell*, 193 F.2d 881, 883 (5th Cir. 1952); *Casualty Reciprocal Exchange v. Johnson*, 148 F.2d 228, 229 (5th Cir. 1945); *Security Mut. Cas. Co. v. Wakefield*, 108 F.2d 273, 274 (5th Cir. 1939). Yet, the Fifth Circuit has engrafted a much broader scope of employment to FELA cases by its decision in this case. Although the above state court inoculation cases do not involve the interpretation of the FELA statute and instead involve state workers' compensation laws and the substantive law of the state on the issue of scope of employment, this Court may take these common law cases into account to recognize that the cases finding inoculations within the scope of employment do not endorse a full-blown acceptance – such that the Court of Appeals seems to have endorsed here. Rather, these courts while recognizing that inoculations can be within the scope of employment, have done so only under exceptional circumstances. This Court need not adopt the "extenuating circumstance" exception one way or the other, but the state cases serve

to illustrate why, in this case, there were no extenuating circumstances which would tend to bring the activity within the scope of employment. *Cf. Metro-North Commuter R.R. Co.*, 117 S.Ct. at 2122.

As a matter of law, Smith was not acting within his scope of employment when he received a voluntary flu shot. The Fifth Circuit opinion goes against the great weight of authority under the common law on scope of employment.

CONCLUSION

This Court has not issued an opinion on the important federal question of scope of employment under the FELA. Other Circuits have found that scope of employment under the FELA requires a showing that the employee's activity was a necessary incident to employment. Smith did not receive a flu shot as a necessary incident to his employment as a matter of law. The response to the motion for summary judgment failed to raise a genuine issue of material fact regarding whether Smith was acting within the scope of his employment when receiving a flu shot. Petitioner, Burlington Northern Railroad Company, requests this Court to grant this Petition for Writ of Certiorari, reverse the United States Court of Appeals for the Fifth Circuit, and reinstate the United

States District Court's judgment in favor of Burlington Northern Railroad Company.

Respectfully submitted,

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APPENDIX A

Michael SMITH; Amanda Kathryn Smith; Melissa Ann Smith, Plaintiffs-Appellants,

v.

MEDICAL AND SURGICAL CLINIC ASSOCIATION, d/b/a Advanced Occupational Health Care; Thomas V. Mears, M.D., Defendants,

Burlington Northern Railroad Company, Defendant-Appellee.

No. 96-10913.

United States Court of Appeals, Fifth Circuit.

July 31, 1997.

Employee brought Federal Employers' Liability Act (FELA) claim against railroad for injuries incurred when he collapsed and suffered head injury after receiving flu shot administered under employer's auspices. The United States District Court of the Northern District of Texas, John McBryde, J., granted summary judgment for railroad. Employee appealed. The Court of Appeals, Benavides, Circuit Judge, held that genuine issue of material fact as to whether employee might reasonably have believed that flu shots were administered, in part, for railroad's benefit precluded summary judgment on whether employee was within scope of his employment when he collapsed and suffered injury.

Reversed and remanded.

Curtis Lee Cukjati, Cacheaux, Cavazos, Newton, Martin & Cukjati, San Antonio, TX, for Plaintiffs-Appellants.

Tracy J. Willi, Womble & Spain, Houston, TX, JoAnn Storey, Houston, TX, for Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas.

Before SMITH, BARKSDALE and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

Appellant Michael Smith collapsed and suffered a head injury after receiving a flu shot administered under the auspices of his employer, Burlington Northern Railroad Co. Smith brought this statutory negligence action against Burlington Northern under the Federal Employers' Liability Act ("FELA" or "the Act"), 45 U.S.C. §§ 51-60. The district court granted summary judgment for the railroad, finding that Smith had failed to produce evidence that his injury occurred within the scope of his employment, as FELA requires. We hold that a genuine issue of material fact exists on this question, and therefore reverse and remand.

I.

It is undisputed for purposes of this appeal that Burlington Northern arranged for employees at its Fort Worth, Texas, office building to receive influenza vaccines in the fall of 1993. It is also undisputed that the flu shots were given on company premises, during work hours, at no charge to the employees. Appellant was a Burlington

Northern manager who took part in the inoculation program, receiving a flu shot on September 28, 1993. The shot was given on the twenty-sixth floor of the Burlington Northern building. After returning to the fifteenth floor, where his office was located, Smith collapsed and struck his head. He claims that the injury caused him to become permanently disabled.

Burlington Northern distributed two fliers to its employees regarding the vaccination program. Smith conceded in his deposition testimony that the flu shots were voluntary, but stated that he felt strongly encouraged to accept a flu shot by the company's fliers. Smith also testified that about two years previously he had missed work because of a severe case of the flu, and that he felt obligated as a good employee to submit to inoculation to avoid another absence.

Viewing the evidence in the light most favorable to Smith, it is clear that Burlington Northern planned, administered, and promoted the flu shot program. The record reflects that the railroad engaged a health clinic to vaccinate its employees at its Fort Worth offices.[1] The record also reflects that any employee who was unable to attend a vaccination session on company premises would

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[1] Smith's flu shot was given by a registered nurse employed by Medical and Surgical Clinic Association, d/b/a Advanced Occupational Health Care ("AOHC"). Smith's complaint named the clinic as a defendant; it also named Dr. Thomas V. Mears, a Burlington Northern vice president who helped initiate the flu shot program. Smith does not appeal the district court's grant of summary judgment in favor of AOHC and Dr. Mears.

be excused from work to receive a flu shot at the health clinic.

Smith argues that based on this record, a jury could find that Burlington Northern actively encouraged participation in the flu vaccine program, and moreover, that the company was motivated to do so, at least in part, by a self-interested desire to reduce absenteeism. At the very least, he contends that a jury could find that an employee in his position might reasonably believe that the flu shot program was intended to reduce sick time, increase productivity, and improve Burlington Northern's bottom line. As discussed below, whether Smith was acting in the scope of his employment when he accepted a flu shot depends on whether he might reasonably have thought doing so would serve Burlington Northern's interests.

II.

We review the district court's grant of summary judgment *de novo*, applying the same standard as the district court. *Thomas v. N.A. Chase Manhattan Bank*, 1 F.3d 320, 323 (5th Cir.1993) (citation omitted); *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 975 (5th Cir.1993) (citation omitted). Summary judgment is proper if the pleadings and the record evidence, including affidavits and deposition testimony, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). At this stage we view the evidence in the light most favorable to the party opposing the motion and draw all reasonable inferences in that party's favor. *Thomas*, 1 F.3d at 323

(citation omitted); *Unida*, 986 F.2d at 975 (citations omitted). Nevertheless, summary judgment is appropriate if the non-moving party fails to adduce sufficient evidence to establish an essential element of his claim on which he bears the burden of proof at trial. *Unida*, 986 F.2d at 975-76 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

III.

FELA provides that "every common carrier by railroad" engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce" where the injury arises from the negligence of the railroad's officers, agents, or employees. 45 U.S.C. § 51. FELA affords railroad employees their only remedy for injuries sustained while engaged in interstate commerce. *See New York Cent. R. Co. v. Winfield*, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045 (1917). To prevail under the Act, a plaintiff must prove that (1) the defendant is a common carrier by railroad engaged in interstate commerce; (2) he was employed by the defendant with duties advancing such commerce; (3) his injuries were sustained while he was so employed; and (4) his injuries resulted from the defendant's negligence. *Fowler v. Seaboard Coastline R.R. Co.*, 638 F.2d 17, 19 (5th Cir. Unit B February 1981) (citing 45 U.S.C. § 51).

The only issue in this appeal is the third element, which requires proof that the plaintiff was injured in the scope of his employment. *See Wilson v. Chicago, Milwaukee, St. Paul, & Pac. R.*, 841 F.2d 1347, 1351 (7th

Cir.1988) (citations omitted). FELA's "scope of employment" requirement has been interpreted broadly. It is not limited to acts required or coerced by the employer. Rather, the scope of employment encompasses "acts incidental to the employment as well as the actual work." *Fowler,* 638 F.2d at 20. In this circuit, "the proper test for scope of employment in a[ ] FELA case [is] whether the act was one which the employer might reasonably have foreseen and which the employee might reasonably have thought necessary in the interest of or in the benefit of the employer." *Id.* at 20 (citing *Texas & Pac. Ry. v. Jones,* 298 F.2d 188 (5th Cir.1962)).

Federal courts have held that FELA claimants were acting within the scope of their employment while eating lunch on company property; sleeping in accommodations provided by the employer during a layover necessitated by railroad work; or riding in a vehicle (but not commuting to or from work) when doing so is a "necessary incident of [the] day's work." *Rogers v. Chicago & North Western Transp. Co.,* 947 F.2d 837 (7th Cir.1991) (citing *Fowler,* 638 F.2d at 20; *Mostyn v. Delaware, L. & W.R. Co.,* 160 F.2d 15, 17-18 (2d Cir.), *cert. denied,* 332 U.S. 770, 68 S.Ct. 82, 92 L.Ed. 355 (1947); *Wilson,* 841 F.2d at 1355). *Accord Jones,* 298 F.2d at 192 (employee injured while voluntarily assisting another employee); *Morris v. Pennsylvania R.R. Co.,* 187 F.2d 837, 841 (2d Cir.1951) (employee killed while crossing tracks on his way to work at defendant's freight yard).

At the opposite pole, "purely private activity totally unrelated to the employment" is not within the scope of employment. *Fowler,* 638 F.2d at 20. Put another way,

FELA "cannot be extended to cover activities not necessarily incident to or an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment." *Id.* (quoting *Atchison, T. & S.F. R. Co. v. Wottle*, 193 F.2d 628, 630 (10th Cir.), *cert. dismissed*, 344 U.S. 850, 73 S.Ct. 89, 97 L.Ed. 661 (1952)). Thus, the family of an employee who was fatally injured while riding his motorcycle on railroad property during a lunch break could not recover under the Act. *Id.* 638 F.2d at 20.

Both parties accept the principles articulated in *Fowler* as the governing legal standards. Our task is simply to apply these principles to the summary judgment evidence. To help narrow our inquiry, we reiterate that under *Fowler*, an activity falls within the scope of employment if (1) the employer might reasonably have foreseen it and (2) the employee might reasonably have thought it necessary for the employer's benefit.

IV.

Burlington Northern does not argue that Smith's participation in the flu shot program was unforeseeable. Rather, the issue is whether an employee such as Smith might reasonably have thought it necessary to accept a flu shot for the benefit of Burlington Northern. If a jury could reasonably answer that question affirmatively, summary judgment is inappropriate. On the other hand, if a reasonable employee must have realized that the flu shots were purely gratuitous private benefits, summary judgment was proper. The question, in other words, is

whether Smith's flu shot and ensuing injury bore some "causal relationship" to his employment, or whether his vaccination was "a purely private activity totally unrelated to the employment." *Fowler*, 638 F.2d at 20.

As we have already observed, Burlington Northern planned, administered, paid for, and (arguably) promoted the vaccination program. In addition, Smith submitted evidence which he contends raises an inference that the railroad was motivated by a desire to reduce absenteeism – or at least, that it was reasonable for him to have thought so. This evidence consists of Smith's own affidavit and deposition testimony and copies of two fliers distributed by Burlington Northern to its employees.[2]

In his affidavit, Smith stated that the company offered the flu shots and that his direct supervisor escorted him from his office to receive his vaccination. Smith conceded that he was not required to take a flu shot, but stated, "I felt strongly encouraged to do so as a 'good' employee."

In his deposition testimony, Smith stated that he felt obligated to submit to a flu shot because about two years previously he had missed work because of a severe case

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[2] The railroad downplays Smith's testimony by describing it as "self-serving." In our adversarial system, self-serving statements are neither unusual nor inherently suspect. It remains for the jury to decide whether Smith's statements are credible and whether they give rise to the inferences urged by Smith: that Burlington Northern encouraged employees to avail themselves of the flu vaccinations and that an employee could reasonably have concluded that the company did so for its own benefit.

of the flu. He stated, "I . . . felt that it was important, in order for me to be a good employee and to avoid losing that kind of productivity, for me to become vaccinated."

The first of the Burlington Northern fliers in the summary judgment record announced, "TIME FOR 1993 FLU SHOTS." It stated that vaccines would be available to all employees who chose to sign up for them.[3] The second flier bore the headline, "ROLL UP YOUR SLEEVE AND BE BRAVE." It stated that flu vaccines would be given free of charge to all employees who had previously signed up to receive them. It also stated that employees who were unable to attend one of the scheduled vaccination sessions on the premises would be authorized to receive their flu shots at the clinic.

Burlington Northern correctly points out that Smith adduced no evidence that the company was actually motivated by self-interest.[4] However, *Fowler* does not require evidence of the employer's actual motivation. Under *Fowler*, Smith need only produce evidence to support the inference that he might reasonably have thought

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[3] The same flier included descriptions of flu symptoms, the vaccine, and possible side effects, as well as a warning that certain employees should check with their physicians before being vaccinated. Burlington Northern contends that the qualifying language in the flier belies Smith's claim that employees were encouraged to undergo inoculation.

[4] Smith cites the deposition testimony of Dr. Thomas V. Mears, the Burlington Northern vice president who helped initiate the flu shot program, as evidence that the railroad was motivated by a desire to reduce absenteeism during flu season. To the contrary, Dr. Mears testified that the vaccinations were intended merely as a convenience for the railroad's employees.

that flu shots were offered in part for the company's benefit.

Based on the summary judgment evidence, a genuine issue exists as to whether an employee might reasonably have believed that the flu shots were administered, in part, for Burlington Northern's benefit. The company developed, administered, and (viewing the evidence in the light most favorable to Smith) promoted the vaccination program. Moreover, the company announced that employees unable to attend the vaccination sessions at the Burlington Northern office building would be excused from work to receive flu shots at the AOHC clinic. Also, the fact that Smith's supervisor accompanied him to the vaccination site might possibly tend to support an inference that the company had an interest in its employees being inoculated. In sum, we think a rational jury could infer that an employee in Smith's position "might reasonably have thought [the flu shots] necessary in the interest of or in the benefit of the employer." *See Fowler*, 638 F.2d at 20.

V.

It may well be that in arranging and paying for the 1993 flu shot program, Burlington Northern was motivated entirely by a humane concern for the welfare of its employees. However, it is no secret that illnesses such as the flu cost American corporations billions of dollars annually in lost productivity and medical insurance expenses. The railroad's decision to provide its employees with free flu shots is no less commendable if it was motivated by enlightened self-interest. Nevertheless,

under FELA, if an employee might reasonably have thought that accepting a flu shot was necessary for the benefit of Burlington Northern, then submitting to inoculation was an act within the scope of employment. We think the evidence adduced by Smith precludes summary judgment on this question.

We conclude that summary judgment against Smith on the "scope of employment" issue was unwarranted. The order of the district court is REVERSED and the case REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL SMITH, ET AL,	§	
Plaintiffs,	§	NO. 4:95-CV-920-A
VS.	§	(Filed June 25, 1996)
MEDICAL AND SURGICAL CLINIC ASSOCIATION D/B/A ADVANCED OCCUPATIONAL HEALTH CARE, ET AL,	§	
Defendants.	§	

MEMORANDUM OPINION
AND
ORDER

Came on for consideration (1) the motion for summary judgment of defendants Medical and Surgical Clinic Association d/b/a Advanced Occupational Health Care ("AOHC"), (2) the motion for summary judgment of defendant Thomas V. Mears, M.D., ("Mears"), and (3) the motion for summary judgment of defendant Burlington Northern Railroad Company ("Burlington"). Plaintiff Michael Smith ("Smith") has filed a response in opposition.[1]

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[1] Smith is the only plaintiff against whom summary judgment is sought. The motions for summary judgment filed by AOHC and Mears were filed before Smith added his two

I. Plaintiffs' Complaint

Smith alleges that he suffered injuries as a result of a flu shot he received on September 28, 1993, during performance of duties within the course and scope of his employment with Burlington, a carrier engaged in interstate commerce within the meaning of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, et seq. He alleges that on September 28, 1993, he received a flu shot from Laila Freidman, R.N., an employee of AOHC, on the 26th floor of the Burlington Office building in Fort Worth. He further alleges that, after receiving the flu shot, he was permitted to leave immediately without medical supervision and he went to the 15th floor where he lost consciousness and fell, as a result of which he suffered a severe closed head injury. He claims that, as a consequence of his injury, he is now permanently disabled, is incapable of any gainful activity, has suffered great physical and mental pain, and has incurred

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daughters as plaintiffs, and thus Smith is the only plaintiff considered for purposes of those motions. And, although Burlington's motion was filed after Smith's two daughters were added as plaintiffs, and in fact makes reference to Smith's first amended complaint, it seeks summary judgment against only Smith.

However, as Mears notes in its reply, the claims of Smith's daughters are derivative of their father's claims. Consequently, any summary judgment granted as to Smith's claims will also be granted as to his daughters' claims. *Brandley v. Keeshan*, 64 F.3d 196, 199 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 947 (1996); *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 541 (Tex. App. – Dallas 1994, writ denied); *Work v. Duval*, 809 S.W.2d 351, 354 (Tex. App. – Houston [14th Dist.] 1991, no writ); *Reagan v. Vaughn*, 804 S.W.2d 463, 467, 468 (Tex. 1990).

expenses in the amount of $400,000.00 for medicine, medical attendance, and hospitalization. He further claims that, prior to his injury, he was a strong, able-bodied man, capable of earning and actually earning in excess of $60,000.00 per year.

Smith brings his claims against Burlington pursuant to FELA, which provides for liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence. Subject matter jurisdiction is based on Smith's claims against Burlington pursuant to FELA, which is an act regulating commerce within the meaning of 28 U.S.C. § 1337. *Imm v. Union R.R. Co.*, 289 F.2d 858, 859-61 (3rd Cir. 1961), *cert. denied*, 368 U.S. 833 (1961).

As for AOHC and Mears, Smith alleges they were negligent and grossly negligent in connection with the vaccine he received, and he thus asserts health care liability claims against them pursuant to Tex. Rev. Civ. Stat. Ann. art. 45901, § 10.01 (Vernon 1996).

II. Motions for Summary Judgment & Smith's Responses

A. Burlington

Burlington asserts that Smith has no valid cause of action under FELA because his alleged injuries were not sustained while Smith was in the course and scope of his employment with Burlington. Burlington argues that, when Smith obtained his flu shot, he was pursuing a private purpose and was not performing duties in the scope of his employment. More specifically, Burlington maintains that the flu shot was voluntary rather than

mandatory, that obtaining a flu shot was a purely private activity unrelated to Smith's employment, and that obtaining the flu shot was not a necessary incident of Smith's work nor essential to the performance of his work.

Smith responds that, in fact, he received the flu shot in the course and scope of his employment, given that the flu shots were not entirely voluntary, that he felt an obligation to get a flu shot, and that the flu shot program was provided for Burlington's benefits.

B. AOHC

AOHC asserts that it is entitled to summary judgment on all claims asserted by Smith because plaintiff has released AOHC from liability as to all claims against it arising out of the influenza injection. It rests its assertion on the release of liability signed by Smith on the date of the injection.

Smith does not deny that he signed the release, but argues that the release is void pursuant to FELA and is void as against public policy under Texas law.

C. Mears

Mears asserts that he is entitled to summary judgment on all claims asserted by Smith because (1) no physician-patient relationship existed between Mears and Smith, (2) Mears is not licensed to practice medicine in the State of Texas, (3) the alleged acts or omissions of Mears did not cause Smith's injuries, and (4) Smith's

causes of action are barred by the affirmative defense of release.

Smith responds that (1) Mears committed affirmative acts which established a physician-patient relationship between him and Smith, (2) although Mears is not licensed to practice medicine in the Staate [sic] of Texas, Smith's health care liability claim is proper, (3) there is sufficient summary judgment evidence to raise a fact issue as to whether Mears was involved in Smith's care and treatment, and (3) [sic] the release Smith signed is void under FELA and void as against public policy under Texas law.

III. Analysis

A. Burlington

It is clear that recovery under FELA may be had only if the plaintiff proves that (1) the defendant company is a common carrier by railroad engaged in interstate commerce, (2) the injured person was employed by the defendant with duties furthering such commerce, (3) the injuries were sustained while the injured person was so employed, and (4) the injuries were the result of the defendant's negligence. 45 U.S.C. § 51; *Fowler v. Seaboard Coastline R.R. Co.*, 638 F.2d 17, 19 (5th Cir. 1981).

The issue here is whether Smith was injured in the course and scope of his employment. In the Fifth Circuit, the test for scope of employment in an FELA case is "whether the act was one which the employer might reasonably have foreseen and which the employee might reasonably have thought necessary in the interest of or in

the benefit of the employer." *Id.* at 20. This definition encompasses acts incidental to the employment as well as the actual work, but does not extend to cover activities undertaken by an employee for a private purpose which has no causal relationship with his employment. *Id.* For example, an employee commuting to or from work generally is not considered to be acting within the scope of employment. *E.g., Getty v. Boston & Main Corp.*, 505 F.2d 1226 (1st Cir. 1974); *Metropolitan Coal Co. v. Johnson*, 265 F.2d 173 (1st Cir. 1959). And, an off-duty employee on a layover jogging on company premises is not acting within the scope of employment, even if the company requires its employees to pass a physical exam and encourage physical activity during layovers by providing passes to the YMCA. *Rogers v. Chicago & North Western Transp. Co.*, 947 F.2d 837 (7th Cir. 1991). But an employee eating lunch on the premises generally is considered within the scope of employment. *E.g., Moore v. Chesapeake & O. Ry. Co.*, 649 F.2d 1004, 1008-11 (4th Cir. 1981); *Virginian Ry. Co. v. Early*, 130 F.2d 548 (4th Cir. 1942). Similarly, an employee remains within the scope of employment during a temporary and necessary interruption of work, such as a rest break or a trip to the restroom. *See Moore*, 649 F.2d at 1008. And, an employee struck by a train on defendant's property shortly before he is to report for work, or as he is leaving work, is in the course of his employment. *Erie R.R. Co. v. Winfield*, 244 U.S. 170, 172-73 (1917); *Morris v. Pennsylvania R. Co.*, 187 F.2d 837, 840-41 (2nd Cir. 1951).

The summary judgment evidence makes clear that participation in the flu shot program was voluntary, and that Smith understood such participation to be voluntary. Smith Deposition, Burlington's Motion, Ex. B, 57-58; *see*

also Smith Affidavit, Smith's Response to Burlington's Motion, Ex. A, ¶ 3. And, apart from Smith's self-serving statements, *see* Smith Affidavit, Smith's Response to Burlington's Motion, Ex. A, ¶ 3, Smith Deposition, Burlington's Motion, Ex. D at 57-58, there is no evidence that Burlington employees were even encouraged to participate in the flu shot program. Indeed, the "FYI communications flyers" by which Smith contends he was encouraged to participate in the flu shot program report the availability of the flu shots in a dispassionate tone, and contain no language of encouragement or exhortation.[2] *See* Smith's Response to Burlington's Motion, Ex. B & C. Moreover, the flyers contain warnings that could actually dissuade employees from having flu shots.[3] *See id.* Ex. B & C.

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[2] The closest the flyers get to encouragement is the heading of the September 23, 1993, flyer which reads as follows:

ROLL UP YOUR SLEEVES AND BE BRAVE. . . .

Smith's Response to Burlington's Motion, Ex. C. However, as the next sentence of the flyer reveals, the message is directed only to those employees who had previously signed up to receive flu shots. *See id.* Therefore, it cannot be said that the flyer was designed to recruit participation in the flu shot program.

[3] For example, the flyer dated August 31, 1993, contained the following alert:

Possible side effects from the vaccine

Most people have no side effects from recent influenza vaccines.

The flu vaccine is given by injection, usually into a muscle of the upper arm. This may cause soreness for a day of two at the injection site and occasionally may also cause a fever or achiness for one or two days. As is the case with most drugs or vaccines, there

In addition, there is no evidence that the flu shot program was established for the benefit of Burlington. In support of his contention that the program was developed for Burlington's benefit, Smith cites the deposition of Mears, a person who was involved in the development of the flu shot program. Mears Deposition, Smith's Response to Burlington's Motion, Ex. E, at 24. Yet, in fact, Mears testified that the program was developed, not to benefit Burlington by preventing employee sick time, but to provide employees with convenient access to the flu shots. *Id.* at 23-24. His testimony could be read as acknowledging that Burlington could reap benefits from the program, but his testimony is clear that any such potential benefits did not provide the impetus for inception of the program. *See id.*

The court finds that the instant case closely parallels *Rogers*, 947 F.2d at 837, in which the plaintiff, who was injured while jogging on his employer's property, argued

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is a possibility that allergic or more serious reactions, or even death, could occur with the flu vaccine.

Warning! Some people should check with their personal physician before taking influenza vaccine

People allergic to eggs or who experience a dangerous reaction if they eat eggs and those who have had a serious reaction to previous influenza vaccination should consult their personal physician before receiving the vaccine.

Women who are or might be pregnant should consult their personal physician.

People who are ill and have a fever should ask their personal physician if they should delay vaccination until the fever and other temporary symptoms have gone.

that his jogging was related to his employment because his employer required that employees be able to pass a physical exam and encouraged physical activity during layovers by providing passes to the YMCA. The plaintiff admitted in his deposition testimony that the railroad did not require its employees to jog or to engage in any type of physical exercise, and, in fact, the plaintiff failed to present any evidence that physical exercise was a necessary prerequisite to passing the physical exam required of railroad employees. As both the trial and appellate courts agreed,

> If plaintiff thought he was doing something which was necessary for or in the benefit of the railroad, this belief was not reasonable. Jogging benefits an employer in such an indirect and tangential way that plaintiff cannot be said to have been acting within the scope of employment.

Rogers, 947 F.2d at 839.

Like the plaintiff in *Rogers*, Smith has failed to show any evidence that having a flu shot was required, or even encouraged, by Burlington. Furthermore, he has not only failed to show that Burlington instituted the flu shot program for its own benefit, he has failed to show that in fact Burlington would have, or did, receive any benefit. To the extent plaintiff thought he was doing something which was necessary for or in the benefit of Burlington, his belief was not reasonable. Flu shots benefit an employer in such an indirect and tangential way, if at all, that Smith cannot be said to have been acting within the scope of his employment. In sum, the court finds that Smith has failed to adduce sufficient evidence to raise a

genuine issue of fact as to whether Smith was within the course of his employment during the administration of the flu shot. Because this is an essential element of Smith's FELA claim, the court concludes that Burlington is entitled to judgment as a matter of law.

B. AOHC

It is not disputed that Smith's signature appears on a release titled "Waiver of Liability for Employees Participating in Voluntary Influenza Vaccinations" and dated September 28, 1993. Smith Deposition, AOHC's Motion, Ex. C, at 62; AOHC's Motion, Ex. A. Moreover, as Smith does not allege that he did not sign the release, the presence of his signature on the release is proof that he signed the release.[4] The pertinent portion of the release is as follows:

> 1. I hereby RELEASE, WAIVE, DISCHARGE, HOLD HARMLESS AND COVENANT NOT TO SUE Burlington Northern ("BN"), Advanced Occupational Health Care ("AOHC"), their agents and officers, and the owners and lessees of premises used for conducting the flu shots offered by BN, all for the

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[4] And, Smith's deposition testimony suggests that Smith did in fact sign it. Smith Deposition, AOHC Motion, Ex. C at 62. The question asked of Smith and his answer are as follows:

Q. What date did you sign [Deposition Exhibit No. 6, which is the release titled "Waiver of Liability for Employees Participating in Voluntary Influenza Vaccinations"]?

A. September 28, 1993.

Id.

purposes herein referred to as "Releasees," from all liability to the undersigned for any and all loss or damage, and any claim or cause of action therefor on account of injury to my person or property or resulting death, while the undersigned is participating in the flu shots being administered by the laboratory/clinic.

* * *

3. I HEREBY ASSUME FULL RESPONSIBILITY FOR RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE due to the negligence of physical injury and/or death.

* * *

5. I further expressly agree that the foregoing, waiver is intended to be as broad and inclusive as is permitted by the law of the State of Texas, in which the flu shot is being administered. This agreement is to be construed according to the laws of the State of Texas, and if any portion thereof is held invalid, it is agreed that the remainder continues to have full legal force and effect.

* * *

6. I HAVE READ AND VOLUNTARILY SIGNED THE WAIVER AND RELEASE OF LIABILITY AGREEMENT, AND I FURTHER AGREE THAT NO ORAL REPRESENTATIONS OR STATEMENTS OF INDUCEMENT APART FROM THE FOREGOING WRITTEN AGREEMENT HAVE BEEN MADE. I HAVE READ THIS DOCUMENT AND I UNDERSTAND IT IS A RELEASE OF ALL CLAIMS. I UNDERSTAND THAT I ASSUME ALL RISKS INHERENT IN TAKING A FLU SHOT. I VOLUNTARILY

> SIGNED MY NAME EVIDENCING MY ACCEPTANCE OF THE ABOVE PROVISIONS.

AOHC's Motion, Ex. A. It also is undisputed Smith's signature appears on a "Flu Register" dated September 28, 1993. Smith Deposition, AOHC's Motion, Ex. C, at 55-56. Again, as Smith does not allege that he did not sign the register, the presence of his signature on the register is proof that he signed the register. On the register above Smith's signature appears the following language:

> By signing below, I hereby request an injection of fluogen. I am not allergic to eggs. I am not currently ill with an elevated temperature. I agree to hold harmless BNRR [Burlington Northern Rail Road], Advanced Occupational Health care, and its agents (nurses).

AOHC's Motion, Ex. B.

Smith asserts that the release is void pursuant to FELA, which provides as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . .

45 U.S.C. § 55. Arguably, this statutory provision could void the release so far as it applied to Burlington, but this statutory provision would have no bearing on the release to the extent the release applied to AOHC. Moreover, the release expressly provides that, if any portion thereof is held invalid, the remainder shall continue to have full legal force and effect. And, as AOHC is not a common carrier, this statutory provision would not void the release as to AOHC. The court finds that, as a matter of

law, 45 U.S.C. § 55 does not render the release is void as to AOHC.

Smith also contends that, under Texas law, the release is void as against public policy, because Burlington required him to sign the release and because there was a disparity in bargaining power in that Smith was Burlington's employee. He further argues that AOHC should not be allowed to benefit from its inclusion in a release voided as against public policy. It is true that agreements to limit liability for future negligent acts are void as against public policy when there exists a disparity of bargaining power between the parties entering into the agreement. *See Allright, Inc. v. Elledge*, 515 S.W.2d 266, 267 (Tex. 1974); *Crowell v. Housing Auth. of City of Dallas*, 495 S.W.2d 887, 889 (Tex. 1973); *Exxon Corp. v. Brecheen*, 519 S.W.2d 170, 175-76 (Tex. Civ. App. – Houston [1st Dist.] 1975), *rev'd on other grounds*, 526 S.W.2d 519 (Tex. 1975). And, "[i]t is generally held . . . that a contract exempting an employer from all liability for negligent injury of his employees in the course of their employment is void as against public policy." *Crowell*, 495 S.W.2d at 889.

The court finds no evidence in support of Smith's contention. There is no evidence that Smith was required to sign the releases. Indeed, inasmuch as the evidence reflects that obtaining the injection was voluntary, AOHC Motion, Ex. A ¶ 6; Smith Deposition, AOHC Motion, Ex. C at 57-58, and there is no evidence showing that obtaining the injection was not voluntary, it must be said that signing the release was also voluntary. Furthermore, in the context of participation in the voluntary flu shot program offered by Burlington, the court finds no evidence of a disparity in bargaining power between Smith

and Burlington, or between Smith and AOHC, given that Smith had full freedom to choose not to receive the shot if he did not want to sign the release, and vice versa. And, as discussed above, the court has found no evidence supporting the conclusion that Smith was acting in the course of his employment when he received the flu shot. Therefore, the court finds that, as a matter of law, the release is not void as against public policy. The court notes that, even if the release were void as against public policy as between Smith and Burlington, it would still be effective as between Smith and AOHC. *See* AOHC Motion, Ex. A, ¶ 5.

In addition to arguing that the release is not void, AOHC also argues that the release is enforceable. In order to be enforceable under Texas law, an advance release of unknown future injuries, such as the release Smith signed, must meet the fair notice requirements of conspicuousness and the express negligence test. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509 (Tex. 1993).

The issue of whether a clause is conspicuous is a question of law. *American Eagle Ins. v. United Technologies Corp.*, 48 F.3d 142, 146 (5th Cir. 1995), *modified on other grounds*, 51 F.3d 468 (5th Cir. 1995); *Cate v. Dover Corp.*, 790 S.W.2d 559, 560 (Tex. 1990). A release clause is considered conspicuous when a reasonable person ought to have noticed it. *Id.* at 511. For example, language in capital headings, language in contrasting type or color, and language in extremely short documents is conspicuous. *Id.*; *e.g.*, *American Eagle Ins. Co. v. United Technologies Corp.*, 51 F.3d 468, 469 (5th Cir. 1995) (concluding that release language contained in a three page document was

conspicuous when the clause was under a capitalized heading and the entire paragraph was bolded); *Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990) (determining that the conspicuousness test was met when the entire agreement appeared on one page and the operative language was on the front side of the document, not hidden under a separate heading or surrounded by unrelated terms).

The release signed by Smith is very similar to other releases that have been found to be conspicuous. The entire agreement is contained on one page. The primary subject matter of the agreement is the release. Much of the operative language is in capital letters. The release language is not obscured or hidden among unrelated terms. Therefore, the court finds that, as a matter of law, a reasonable person ought to have noticed the release language in the document Smith signed, and that therefore, the release language is conspicuous.

The express negligence doctrine states that a party seeking indemnity or release from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract. *See Dresser Indus.*, 853 S.W.2d at 508-09. As is clear from the portions of the release quoted above, the release in question here expresses, in specific terms within the four corners of the contract, that AOHC is seeking release from the consequences of its own negligence. As a result, the court finds that, as a matter of law, the express negligence doctrine is satisfied by the release.

Because the court finds that the release signed by Smith on September 28, 1993, meets the fair notice

requirements of conspicuousness and the express negligence test, the court finds that the release is enforceable. Inasmuch as the release operates to release AOHC from all liability, including AOHC's own negligence, in connection with Smith's flu shot, the court finds that AOHC is entitled to summary judgment on all of Smith's claims against it.

C. Mears

Mears asserts that he is entitled to summary judgment on all claims asserted by Smith because (1) no physician-patient relationship existed between Mears and Smith, (2) Mears is not licensed to practice medicine in the State of Texas, (3) the alleged acts or omissions of Mears did not cause Smith's injuries, and (4) Smith's causes of action are barred by the affirmative defense of release.

1. Physician-patient relationship

It is well-established under Texas law that a physician cannot be held liable for medical malpractice unless a physician-patient relationship exists. *St. John v. Pope*, 901 S.W.2d 420, 423 (Tex. 1995). This relationship can only be created with the physician's consent. *Id.* When no prior physician-patient relationship exists, "the doctor must take some action to treat the patient before the relationship can be established." *Ortiz v. Shah*, 905 S.W.2d 609, 611 (Tex. App. – Houston [14th Dist.] 1995, writ denied).

There is no summary judgment evidence that a physician-patient relationship existed between Mears and Smith at the time of the injection. Mears denies the existence of a physician-patient relationship. Mears Affidavit, Mears' Motion, Ex. C at 3.[5] In addition, Smith admits that he did not have a physician-patient relationship with Mears prior to moving to Fort Worth in August of 1993. Smith Deposition, Mears' Motion, Ex. E at 144. Furthermore, Smith acknowledges that he never met with Mears, nor did Mears ever examine or treat him, between the time he moved to Fort Worth and the date of the injection, and that, as of the date of the injection, he and Mears did not have a physician-patient relationship. *Id.* at 144-47.

The evidence relied upon by Smith simply does not indicate that Mears and Smith had a physician-patient relationship. Although Mears apparently had some supervisory role in the offering of flu shots to Burlington employees, *see* Mears Deposition, Mears' Motion, Ex. D., at 7-10, 20-22, 43-44; Mears Deposition, Smith's Response, Ex. F, at 18-25, such involvement was tangential at best, and certainly did not amount to providing treatment to

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[5] Mears states as follows:

> At no time have I ever represented to Mr. Smith that I was licensed to practice medicine in the State of Texas; or that I was his physician. Michael Smith never sought treatment from me as a medical doctor. I have never conducted any type of medical examination of Michael Smith, nor have I ever treated or offered to treat him. Michael Smith has never been my patient.

Mears Affidavit, Mears' Motion, Ex. C at 3.

Mears [sic]. To the extent Mears had discussions with Smith and others about Smith's injuries following Smith's accident, such discussions were about Smith's ability to perform his work at Burlington and about Smith's disability benefits, and did not amount to providing treatment to Smith. Mears Affidavit, Mears' Motion, Ex. C at 3; Smith Deposition, Smith's Response, Ex. E at 155-57, 159-63. Furthermore, even if such discussions did establish the existence of a physician-patient relationship, which they did not, they all occurred subsequent to Smith's accident, yet Smith's claims are of negligence pertaining to the administration of the flu shot, which of course was before his accident. Smith Deposition, Smith's Response, Ex. E at 162-63. Similarly, the attending physician's statement on which Mears' name appears as Smith's attending physician is dated August 14, 1995, nearly two years after Smith's injection. Smith's Response, Ex. G. As there is no summary judgment evidence of a physician-patient relationship between Mears and Smith at the time of the injection, the court finds that Mears is entitled to summary judgment on Smith's claims against him.

2. Release

The release signed by Smith also warrants judgment in favor of Mears. As discussed previously, the court find that such release is not void as against public policy and is enforceable. By signing the release, Smith agreed to "RELEASE, WAIVE, DISCHARGE, HOLD HARMLESS AND COVENANT NOT TO SUE" Burlington's agents and officers. Mears' Motion, Ex. F ¶ 1. It is undisputed that, at the time of Smith's injection, Mears was employed

by Burlington as Vice President, Occupational and Environmental Health and Wellness. Mears Affidavit, Mears' Motion, Ex. C. Therefore, the release is effective as to Mears, and Mears is entitled to summary judgment on Smith's claims against him.

3. License to Practice in Texas

Under Texas law, a "health care liability claim" such as the one brought by Smith against Mears is defined as follows:

> (4) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

Tex. Rev. Civ. Stat. Ann. art. 4590i, § 1.03(a)(4) (Vernon 1996). A "health care provider" is defined as follows:

> (3) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.

Id. § 1.03(3). And, a "physician" is defined as follows:

> (8) "Physician" means a person licensed to practice medicine in this state.

Id. § 1.03(8).

Inasmuch as Smith's claims against Mears are based on allegations that Mears engaged in conduct in the care of Smith that constituted negligence, Smith's claims are health care liability claims within the meaning of § 1.03(4). But, the definitions of "health care provider" and "physician" make clear that health care liability claims cannot be asserted against a physician who is not registered to practice in the State of Texas. There is no evidence suggesting that Mears is, or ever has been, registered to practice in the State of Texas. Instead, the evidence plainly shows that Mears is not, and never had been, registered to practice in the State of Texas. Mears Deposition, Mears' Motion, Ex. D. at 43-44. Therefore, the court finds that Smith's claims against Mears, to the extent they are health care liability claims within the meaning of art. 4590i, § 1.03(a)(4), cannot be maintained. Yet, if this were Mears' only ground for dismissal, the court likely would not grant Mears' motion, but would, giving Smith the benefit of the doubt, presume Smith asserts claims not only under Texas' Medical Liability and Insurance Improvement Act, but also under the common law. However, as discussed above, the court finds other grounds on which Mears' motion for summary judgment should be granted.

4. Causation

Mears' final argument is that his alleged acts or omissions did not cause Smith's injuries. Even though Mears' role Mears [sic] in arranging for the flu shots to be provided to Burlington employees was limited, the court is unwilling to say that there is no issue as to whether the alleged acts or omissions of Mears proximately caused

Smith's injuries. However, for the other reasons the court discussed above, Mears is entitled to summary judgment on Smith's claims against him.

IV. Smith's Daughters' Claims

Smith's two daughters were added as plaintiffs in plaintiffs' first amended original complaint. Their losses are described as follows:

> Plaintiffs Amanda and Melissa Smith have experienced mental anguish in the past as a result of this incident and in all reasonable probability will sustain mental anguish in the future.
>
> Plaintiffs Amanda and Melissa Smith have experienced parental loss of consortium in the past as a result of this incident and in all reasonable probability will sustain parental loss of consortium in the future.
>
> Plaintiffs Amanda and Melissa Smith have experienced parental loss of household services in the past as a result of this incident and in all reasonable probability will sustain parental loss of household services in the future.

Plaintiffs' First Amended Original Complaint at 6.

It is clear that the claims of Smith's daughters are derivative of their father's claims. Consequently, any summary judgment granted as to Smith's claims will also be granted as to his daughters' claims. *Brandley v. Keeshan*, 64 F.3d 196, 199 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 947 (1996); *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 541 (Tex. App. – Dallas 1994, writ denied); *Work v. Duval*, 809 S.W.2d 351, 354 (Tex. App. – Houston [14th Dist.] 1991, no

writ); *Reagan v. Vaughn*, 804 S.W.2d 463, 467, 468 (Tex. 1990). Inasmuch as the court has determined that Burlington, AOHC, and Mears are entitled to summary judgment as to all of Smith's claims, the court finds that summary judgment should also be granted as to his daughters' claims.

V. Counterclaim

Pursuant to a telephone conference between the court and counsel for plaintiff and defendant AOHC held June 24, 1996, counsel for AOHC informed a member of the court's staff by telephone on the date of the signing of this memorandum opinion and order that AOHC does not wish to pursue its counterclaim if its motion for summary judgment is granted. Therefore, the counterclaim of AOHC is being dismissed without prejudice.

VI. ORDER

The court ORDERS that the motions for summary judgment of Burlington, AOHC, and Mears be, and are hereby, granted, and that plaintiffs' claims against Burlington, AOHC, and Mears be, and are hereby, dismissed.

The court further ORDERS that Burlington, AOHC, and Mears have and recover all costs of court from plaintiff Michael Smith.

The court further ORDERS that the counterclaim of AOHC be, and is hereby, dismissed without prejudice.

SIGNED June 25, 1996.

/s/ John McBryde
JOHN McBRYDE
United States District Judge